Supreme Court, U.S.
FILED

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09-71 JUL 16 2009

No. OFFICE OF THE CLERK
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IN THE
SUPREME COURT OF THE UNITED STATES

NATHANIEL SLATER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

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(Appointed Pursuant to the Criminal Justice Act 18 U.S.C. § 3006A)
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July 16, 2009

QUESTION PRESENTED

Whether the Court of Appeals exceeded the permissible limits of the conduct that may be prosecuted as a single conspiracy under the federal narcotics conspiracy statute (21 U.S.C. § 846), as defined by this Court's prior decisions delineating the boundaries of conspiracy, in sustaining Petitioner's conviction for participating in a large, single, unified crack cocaine conspiracy within a multi-building housing project, where the overwhelming evidence at trial demonstrated distinct, smaller conspiracies among different groups organized in separate buildings as demonstrated by intense competition between the buildings for territory, customers and workers.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The order and unpublished opinion of the United States Court of Appeals for the Second Circuit were issued on April 17, 2009 and reported at 2009 U.S. App. LEXIS 8075 (App., infra, 1a, 15a). A timely petition for rehearing filed by Appellant Anthony Bowen was denied on May 19, 2009. (App., infra, 28a).

The decision of the United States District Court for the Southern District of New York is not reported. A reproduction of the judgment is attached. (App., infra, 35a).

JURISDICTION

The United States Court of Appeals for the Second Circuit entered its judgment on April 17, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED IN THIS CASE

21 U.S.C. § 846 provides:

> Any person who attempts or conspires to commit any offense defined in this title shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

STATEMENT OF THE CASE

A. Background Facts

Petitioner Nathaniel Slater was initially charged in an indictment with forty-two other individuals alleging that he participated in a large,

single, unified conspiracy to distribute crack cocaine in the Mitchel Houses, a housing complex located in the Bronx, New York (A 15-26),[1] in violation of 21 U.S.C. § 846. The government proceeded to trial on the Thirtieth Superceding Indictment (the "Superceding Indictment") in that matter. (A 27-34). Specifically, Count One of the Superceding Indictment, the only count in which Mr. Slater was charged, alleged that from 1994 to 2005, Mr. Slater and others participated in a narcotics-trafficking gang called "Hellbound," that operated a unified drug market in the Mitchel Houses. (A 28).

The Superceding Indictment further alleged that while each building in the Mitchel Houses operated as a market for crack cocaine, the workers collaborated in that they shared apartments to store crack; the "pitchers" (street level dealers) and managers moved between buildings; and all worked together to retaliate against outsiders threatening "Hellbound territory." (A 30).

Appellant was alleged to be the "boss" of the Mitchel Houses building at 350 E. 137th Street. (A 30). Trey Boglin was alleged to be the boss at 175 Alexander Avenue; Alvin, Jeffrey and Nelson Martinez were alleged to be the bosses at 205 Alexander Avenue; Eric Glover was alleged to be the boss at 215 Alexander Avenue; Berron West was alleged to be the boss at 175 Willis Avenue; Anthony Ward was alleged to be the boss at 225 Willis Avenue; and Orande Forde and Shawn Saunders

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[1] All citations are to the Appendix filed in the United States Court of Appeals for the Second Circuit.

were alleged to be the bosses at 303 E. 135th Street. (A 20).

On February 26, 2007, Mr. Slater and three co-defendants (Nelson Martinez, Jeffrey Martinez and Anthony Bowen) proceeded to trial in the United States District Court for the Southern District of New York.

As the government conceded in its rebuttal closing argument, there was no physical evidence introduced against Mr. Slater at trial. (A 591, Tr. 1933). Additionally, the government called 18 law enforcement witnesses, none of whom testified about, or said anything about, Mr. Slater, with the exception of Detective Jose Ramirez of the New York City Police Department, who testified only that he had seen Mr. Slater at the Mitchel Houses (A 119, Tr. 79). Special Agent Samantha Lockery of the FBI testified only that Mr. Slater was arrested on a federal warrant issued in this case. (A 521, Tr. 1715).

The sole evidence against Mr. Slater consisted of the testimony of four cooperating witnesses – (1) Eric Glover, (2) Norbell Lynch, (3) James House and (4) George Verdejo.

Eric Glover was alleged to be the boss at 215 Alexander Avenue, one of the Mitchel Houses buildings. Glover identified Mr. Slater as being "established" in a Mitchel Houses building at 350 E. 137th Street. (A 191, Tr. 291). With respect to the interaction between the various alleged crack cocaine dealers, Glover testified, inter alia, that crack cocaine workers could not sell at more than

one building (A 193, Tr. 300); and that Mr. Slater and Boglin wanted to "shut down" Glover and co-defendant Jeffrey Martinez's operation at 215 Alexander Avenue. (A 228, Tr. 375-376). Glover also admitted to participating in many violent acts at the Mitchel Houses, but none having to do with protecting narcotics territory as alleged in the Superceding Indictment. Glover testified about one shooting, the genesis of which was a "staredown" and exchange of words (A 179-180, Tr. 244-249), and a revenge shooting stemming from a robbery (A 185, Tr. 266-267). Glover himself was shot by another Mitchel Houses competitor for "cutting off his [narcotics] traffic." (A 214-215, Tr. 322-324).

Norbell Lynch testified that he worked for Mr. Slater from late 1997 to early 1999 at Mitchel Houses buildings 350 East 137th Street and 360 E. 137th Street. (A 285, Tr. 657). Lynch further testified that: (i) a crack cocaine worker selling in one building could not move to another building without the permission of the boss at the building to which he wanted to move or there would be "consequences" (A 300, Tr. 716-717); (ii) once you moved to a new building, you could not sell in your old building or any other building (A 304, Tr. 733-734); and (iii) those selling crack cocaine would warn each other when the police were coming. (A 300, Tr. 719). Lynch testified that when business was slow, Mr. Slater and Boglin would merge operations, but the buildings would not work together in any other way. (A 717).

Most significantly, Lynch testified that the Mitchel Houses buildings competed for customers by,

among other means, varying packaging and serving sizes "so the customers would come to your building only" (A 300, Tr. 717).

James House testified that he sold crack cocaine for Mr. Slater from 1996 to 2000. (A 393, Tr. 983). House further testified to numerous acts of violence, but none aimed at protecting the alleged Hellbound drug territory: one was a revenge shooting (A 409-412, Tr. 1047-1062), which House said had nothing to do with the drug business (A 439, Tr. 1290); another shooting arose when a person was "disrespectful" at a funeral for wearing Blood colors when the deceased was a Crip (A 420-421, Tr. 1091-1096; A 422, Tr. 1099-1101); an additional shooting incident in which House was involved arose from "talking trash" (A 419-420, Tr. 1084-1091); and yet another shooting incident at a basketball game arose because an associate of House's threw juice in the face of a person from another housing project (Tr. 1139-45).

George Verdejo testified that he also worked for Mr. Slater at various times at 350 and 360 E. 137th Street (A 464, 480; Tr. 1456, 1542). Verdejo also explained that (i) crack cocaine workers could not sell in more than one building (A 488-486, Tr. 1562-1563) and (ii) when one building ran out of crack cocaine, they never referred their customers to another building (A 486, Tr. 1563).

Verdejo also testified that the different buildings had tried to merge, but only for a brief period. (A 486, Tr. 1564). Verdejo said that he, Mr. Slater and Boglin would occasionally package their

crack cocaine together. Verdejo made clear, however, that they were not working together, but rather "we all grew-up together," and it was perfectly normal for them to package in front of each other. (A 480, Tr. 1542).

At the close of the government's case, Mr. Slater moved for a judgment of acquittal pursuant to Fed. R. Crim. P. 29 on the grounds that, inter alia, the government's evidence established that "Hellbound" was a rap group and not a narcotics organization; and that the government had failed to establish the single, overarching conspiracy alleged in the Superceding Indictment and at best established a series of smaller conspiracies within each Mitchel Houses building. The District Court denied that motion. (App., infra, 30a). In its charge to the jury, the District Court issued a "multiple conspiracy" charge. On March 14, 2007, the jury found Mr. Slater and his three co-defendants guilty.

Mr. Slater filed a post-verdict written motion for a judgment of acquittal pursuant to Fed. R. Crim. P. 29, or alternatively a new trial pursuant to Fed. R. Crim. P. 33, again on the grounds that the evidence at trial failed to support the existence of the large, single unified "Hellbound" conspiracy alleged in the Superceding Indictment. By Memorandum Order dated June 18, 2007, the District Court denied this motion. On June 28, 2007 Mr. Slater was sentenced to 360 months imprisonment. Mr. Slater timely appealed his conviction and sentence to the United States Court of Appeals for the Second Circuit.

B. The Second Circuit Decision

Mr. Slater argued on appeal, inter alia, that the evidence was insufficient to prove the existence of the single overarching conspiracy of which he was convicted.

The Second Circuit affirmed his conviction. Citing "United States v. Sisca, 503 F.2d 1337, 1345 (2d Cir. 1974) ('It is sufficient for the government to have proven . . . that each [conspirator] knew from the scope of the operation that others were involved in the performance of functions vital to the success of the business.')" (App., infra, 21a), it found that while there was overt competition among the Mitchel Houses buildings, "[t]his competition, however, does not mean that the conspiracy was not present, as long as the conspirators were working together toward the shared goal of distributing crack cocaine around the Mitchel Houses." App., infra, 22a. The Court further reasoned that "[d]espite evidence of their sometime competing interests, members of the conspiracy shared resources, and workers from the various buildings acted in concert to warn each other if the police were present" App., infra, 22a. The Second Circuit also cited testimony "that when business 'slowed up,' Slater would 'merge' his operations with Trey Boglin (the boss of 175 Alexander Avenue)" (App., infra, 19a, 21a) and "[f]ollowing the arrest of one of his employees, Slater discussed with bosses Glover and Nelson Martinez his plan to reopen 350 East 137th Street for crack cocaine sales" (App., infra, 20a).

REASONS FOR GRANTING THE PETITION

This case presents an important and recurring legal question concerning the limits on the conduct that may be prosecuted in a single conspiracy under the federal narcotics conspiracy statute, 21 U.S.C. § 846. Specifically, the Court of Appeals erred in upholding Mr. Slater's conviction based on his alleged participation in a single, large purported conspiracy that exceeded the permissible legal limits for the conduct that may be charged as a single conspiracy under Section 846, as interpreted by this Court's prior decisions on the nature and limits of conspiracy. The overwhelming evidence at trial demonstrated the existence of multiple, distinct smaller conspiracies by separate groups of individuals who separately controlled the narcotics traffic in different buildings in a single housing complex and who competed vigorously with each other.

In sustaining the conspiracy conviction, the Second Circuit improperly relied on a geographic criterion – grouping all conduct together because it occurred in a single housing complex – rather than applying the test required by law, which forces the government to prove the essential unified nature of the single plan in which the defendants allegedly participated. In so holding, the Court of Appeals pushed the boundaries of the conduct that may be prosecuted as a single conspiracy well beyond the limits permitted by this Court's precedent.

Accordingly, this Court should grant review to consider the important legal question concerning the

limits on the behavior that may be prosecuted as a single conspiracy.

I. The Court of Appeals Erred by Affirming Mr. Slater's Conviction for the Alleged Single Conspiracy When the Overwhelming Evidence Showed the Existence of Multiple, Competing Conspiracies.

More than half a century ago, Justice Jackson cited the development of conspiracy as an illustration of "the tendency of a principle to expand itself to the limit of its logic." Krulewitch v. United States, 336 U.S. 440, 446-47 (1948)(Jackson, J., concurring).

This Court "repeatedly warned that [it] will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions." Grunewald v. United States, 353 U.S. 391, 404-05 (1957) (citing Delli Paoli v. United States, 352 U.S. 232 (1957); Lutwak v. United States, 344 U.S. 919 (1953); Bollenbach v. United States, 326 U.S. 607 (1946)).[2] It has also expounded

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[2] In Grunewald, this Court confronted a "typical example of a situation where the Government," faced with unfavorable legal and factual circumstances, attempted "to open the very floodgates against which Krulewitch warned." 353 U.S. at 404-05 (in rejecting the government's attempt to expand conspiracy by implying a subsidiary conspiracy to conceal the main conspiracy -- to resume a time-barred prosecution -- the Court stated that expanding conspiracy in this way would result "in an awesome widening of the scope of conspiracy" and "extend the life of a conspiracy indefinitely.").

upon the "important considerations of policy behind such warnings," 353 U.S. at 404, incorporating Justice Jackson's warning from his concurrence in Krulewitch, supra. See id.

In Kotteakos v. United States, 328 U.S. 750 (1946), the Court recognized the potential for prosecutorial abuse and prejudice to individual rights in conspiracy cases, see Krulewitch, 336 U.S. 445-46, and attempted to curb the expansion of federal conspiracy law. In that case, multiple defendants, engaged in multiple conspiracies, were convicted of an overarching conspiracy to submit fraudulent loan applications to the Federal Housing Authority. The Court reversed the defendants' convictions, reasoning that Congress never:

> intende[d] to authorize the Government to string together, for common trial, eight or more separate and distinct crimes . . . [when] the dangers for transference of guilt from one to another across the line separating conspiracies . . . are so great that no one really can say prejudice to substantial right has not taken place.

328 U.S. at 773.

The Court has further reminded the lower courts and prosecutors that "charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning . . . a drag-net to draw in all substantive crimes." Direct Sales Co. v. United States, 319 U.S. 703, 711 (1943).

In upholding Mr. Slater's conviction, the Second Circuit erred in defining the scope of the conspiracy in a manner that exceeded the limits established by this Court. It stretched the legal concept of conspiracy past its breaking point, ignoring this Court's edict that conspiracy convictions can stand only on a showing of the "essential nature of the plan and their [the conspirators'] connections with it." Blumenthal, 332 U.S. at 557.

The nature of the conspiracy charged in this case, Mr. Slater's conviction and the Court of Appeals' affirmance of that conviction stand in sharp contrast to this Court's express warnings on the overexpansion of conspiracy. The evidence at trial of competition between buildings far outweighed any meager evidence of collaboration. There was no evidence of "the essential nature of the plan," Blumenthal, 332 U.S. at 557, as it was alleged in the Superceding Indictment that is, as a single, overarching, unified conspiracy run by a narcotics organization called "Hellbound."

The Court of Appeals erred in basing the finding of a common plan on nothing more than all defendants' desire to sell narcotics in a single broad location as defined by the imposition of an external geographic template. As such, the Court of Appeals ignored the actual evidence of the existence of multiple, competing groups operating within abstract coordinates on a map. It is akin to saying that Ford and Chrysler are co-venturers because they both desire to sell cars in Detroit. To the

contrary, they are vigorous competitors that would like nothing more than to put one another out of business. The separate groups competing to sell narcotics in the various Mitchel Houses buildings behaved in the same aggressive, competitive manner.

As government cooperator Norbell Lynch and other cooperators testified, if you were selling in one building, you could not move to another building without the permission of the boss of the building to which you wanted to move. If you did not get that permission (in other words if you were perceived as being part of one person's operation while selling in another's building) there would be "consequences," according to Lynch. (A 300, Tr. 716-717). Once you moved to a new building, you could not sell in your old building or any other building. (A 304, Tr. 733-734; A 485-486, Tr. 1562-63). If the Mitchel Houses were any type of collective venture or if there were any type of common plan, workers would either need the permission of both bosses to move between buildings or the workers could switch buildings any time they pleased so long as they were selling crack cocaine for the organization. That a crack cocaine worker needed the new boss's permission, but not the old boss's, is no different than a person quitting a legitimate job and seeking employment elsewhere.

Lynch further testified that the buildings competed for customers by, among other means, varying packaging and serving sizes "so the customers would come to your building only." (A 300, Tr. 717). Further demonstrating that the buildings were competitors was Glover's testimony that Mr.

Slater and Boglin, another alleged co-conspirator, were going to try to "shut-down" Glover's and Jeffrey Martinez's operation at 215 Alexander Avenue. (A 228, Tr. 375-376). Co-conspirators do not try to shut one another down. Along the same line, Verdejo testified that when one building ran out of crack cocaine, they never directed the customer to another building to fulfill his need (A 486, Tr. 1563), as would be expected in any joint venture.

The evidence at trial further demonstrated that buildings opened and closed for crack cocaine sales over the years. (See, e.g., A 191, Tr. 289; A 227, Tr. 373; A 399, Tr. 1006; Tr. 1149-1151; A 465, Tr. 1438; A 478, Tr. 1532; A 479, Tr. 1536). For example, when Glover returned from a prison stint, he "analyzed the area" and noted crack cocaine was being sold inside 215 Alexander Avenue, but not outside. Accordingly, he established a business there. (A 191, Tr. 289). He did this without consultation or seeking anyone's permission as would be necessary were there a common plan. Furthermore, each of the cooperating witnesses testified that they moved buildings for various reasons throughout their careers if, for example, they saw a better opportunity in another building or had a falling out with the boss of the building. (See, e.g., A 189, Tr. 284; A 191, Tr. 289; A 304, Tr. 733; A 399, Tr. 1006-1007; A 399, Tr. 1009; A 424, Tr. 1107-1110; Tr. 1149-1151; A 469, Tr. 1454; A 484, Tr. 1555). As another government cooperator James House described his movements, he sold drugs with different people at different times and in different situations, but all in the Mitchel Houses. (A 451; Tr. 1339-1340). If this were a single conspiracy or any

type of common venture, there would not be this unplanned opening and closing of buildings or inefficient movement of people between buildings when they became unhappy with their situations. These people were not transferred between buildings for economic efficiencies. They quit and got a job somewhere else.

Any evidence of common conduct did not support, and indeed even contradicted, the notion of a vast plan between the groups competing for dominance in various Mitchel Houses buildings. Nor does the evidence show a common plan or any intention on Mr. Slater's part to join with the other buildings in the large, single unified conspiracy charged in the Superceding Indictment.

While there was some testimony that Verdejo and others allegedly working at 350 E. 137th Street, and Boglin, the purported boss of 175 Alexander Avenue, sometimes packaged crack together in an apartment in 350 E. 137th Street, Verdejo made clear that they were not working together at that time. As Verdejo explained, "we all grew-up together," and it was perfectly normal for them to package in front of one another. (A 480, Tr. 1542). This was a relationship not based on concerted criminal conduct, but familiarity, comfort and confidence that the others would not inform the police. (A 497-498, Tr. 1610-11). As House testified, Boglin and Mr. Slater were "best friends." (Tr. 1156).[3]

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[3] Glover testified that he packaged crack cocaine in Boglin's building, but that Boglin did not know about it. Glover

There was also testimony that the workers from different buildings would warn each other if the police were in the complex. (A 300, Tr. 719; A 486, Tr. 1564). Each building, however, appeared to maintain its own lookout. Furthermore, this does not establish concerted action. The buildings did not form joint patrols to watch for the police or even take turns posting one individual as a lookout. One building's employees warning the others if the police were around is nothing more, and not dissimilar from, motorists flashing their lights to warn of an upcoming speed trap, although the offenses are certainly of a much different magnitude. And, as laid out in the Statement of the Case, pages 2, 5, supra., none of the copious evidence of violence was aimed at protecting "Hellbound Territory," contrary to the allegations in the Superceding Indictment. While there was some testimony about attempts to merge operations, those attempts were only for brief periods, such that the efforts failed. (See A 190, 486, Tr. 285-86, 1564). In brief, none of this conduct establishes the conspiracy alleged in the Superceding Indictment involving six buildings, seven bosses, and dozens of lower level conspirators.

Basing a conviction in a large, single overarching conspiracy, as alleged here, on such vague and meager incidents of common conduct and in the face of clear evidence of competition is a

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claimed it would not have been a problem if Boglin knew. (A 193, Tr. 299-300). Nevertheless, it strains credibility to believe that if Boglin and Glover were co-conspirators, one would package in another's building without informing him.

conviction based upon "piling inference upon inference," thus forming "a drag-net to draw in all substantive crimes" against which this Court warned in Direct Sales. 319 U.S. at 711. Mr. Slater's conviction was secured upon such a drag net. As the government conceded at trial, there was no physical evidence against him and no law enforcement testimony (surveillance, undercover or otherwise). (A 591, Tr. 1933). Because this large, single, unified conspiracy was charged, however, the government was able to introduce against Mr. Slater vast swathes of evidence that otherwise would have been inadmissible in a prosecution of a smaller conspiracy involving the building of which Mr. Slater was alleged to be the boss, including significant evidence of murders and other violence. As such, Mr. Slater was subject to the easy "transference of guilt" which this Court found unacceptable in Kotteakos.

In sum, the Court of Appeals erred because there was no evidence of the "essential nature of the plan," Blumenthal, 332 U.S. at 557, because, simply, there was no common plan. Instead, the government attempted to draw an artificial boundary around a free wheeling crack cocaine market on the theory that all of the market participants desired to sell crack in the Mitchell Houses, thereby sweeping in unconnected criminal acts perpetrated by largely unconnected actors and securing convictions by inference and taint.

As Mr. Slater's case demonstrates, the government's current notions on the limits of conspiracy as sanctioned by the Second Circuit here, have applied the principle of conspiracy under

Section 486 beyond "the limit of its logic." Krulewitch, 336 U.S. at 446-47. This Court stated long ago that it "will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions." Grunewald, 353 U.S. at 404-05. That is precisely what happened here, and the Court should grant this Petition and restore the proper limits on the scope of conspiracy.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Dated: July 16, 2009

Respectfully submitted,

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(Appointed Pursuant to the Criminal Justice Act 18 U.S.C. § 3006A)
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Counsel for Petitioner
Nathaniel Slater

APPENDIX

USDC SDNY
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MANDATE

07-1589-cr
United States v. Marrero

UNITED STATES COURT
OF APPEALS
FOR THE SECOND CIRCUIT

S U M M A R Y O R D E R

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY TIM COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT

http://www.ca2.-uscourts.gov/), THE PARTY CITING THE SUMMARY ORDER MUST FILE AND SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED. IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 17th day of April, two thousand nine.

UNITED STATES COURT OF APPEALS
FILED
APR 17 2009
Catherine O'Hagan Wolfe, Clerk
SECOND CIRCUIT

PRESENT: HON. CHESTER J. STRAUB,
HON. PETER W. HALL,
Circuit Judges,
HON. STEFAN R. UNDERHILL,*
District Judge.

United States of America,

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* The Honorable Stefan R. Underhill, United States District Judge for the District of Connecticut, sitting by designation.

Appellee,

v.

Docket No.[s]: 07-1589-cr(lead),
07-2247-cr(Con), 07-2787-cr(Con),
07-2930-cr(Con), 07-2931-cr(Con),
07-3584-cr(Con)

Gregory Moore, Jason Mitchell, Jeffrey Martinez, Alvin Martinez, Nathaniel Slater, Anthony Bowens also known as Tony Felder, Nelson Martinez,

Defendants-Appellants.[1]

FOR APPELLANT JEFFREY MARTINEZ: Anthony L. Ricco, (Steven Z. Legon, on the brief), New York, NY.

FOR APPELLANT ALVIN MARTINEZ: Maurice H. Sercarz, (Julia L. Gatto, on the brief), SERCARZ & RIOPELLE, LLP, New York, NY.

FOR APPELLANT NATHANIEL SLATER: William H. Devaney, (Liam C. Ewing, Jr., Meredith Boylan, on the brief), VENABLE LLP, New York, NY.

FOR APPELLANT

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[1] We resolved the appeals of Defendants Gregory Moore and Jason Mitchell in separately issued orders.

ANTHONY BOWENS:	Melinda M. Sarafa, SARAFA LAW, LLC, New York, NY.
FOR APPELLANT NELSON MARTINEZ:	Steven A. Feldman, New York, NY.
FOR APPELLEE:	David V. Harbach, ll, Assistant United States Attorney for Michael J. Garcia, United States Attorney for the Southern District of New York, New York, NY.

UPON DUE CONSIDERATION, it is hereby ORDERED, ADJUDGED, AND DECREED that the judgments of conviction of the United States District Court for the Southern District of New York (Rakoff, J.) are AFFIRMED and the sentences of Appellants Jeffrey Martinez, Nelson Martinez, Nathaniel Slater, and Anthony Bowens are remanded for resentencing in accordance with Kimbrough v. United States, 128 S. Ct. 558 (2007).

Defendants-appellants Jeffrey Martinez, Nelson Martinez, Slater, Bowens, and Alvin Martinez appeal from judgments of conviction entered on June 26, 2007, June 28, 2007, June 29, 2007, and July 27, 2007, resulting from their involvement in a conspiracy to distribute crack cocaine in and around the Mitchel Housing Projects in the County of the Bronx between 1994 and 2005. Following a jury trial in the Southern District of New York, Defendants Jeffrey Martinez, Nelson Martinez, Slater, and Bowens were convicted of conspiracy to distribute 50 grams or more of crack

cocaine, in violation of 21 U.S.C. §§ 841 and 846. Defendant Alvin Martinez pleaded guilty prior to trial pursuant to a plea agreement. The district court sentenced Jeffrey Martinez, Nelson Martinez, and Slater to 360 months' imprisonment. Bowens received a sentence of 180 months, and Alvin Martinez was sentenced to 120 months' imprisonment.

On appeal, the defendants challenge their convictions and sentences on numerous grounds. We assume the parties' familiarity with the underlying facts and procedural history.

Sufficiency of Evidence

Jeffrey Martinez, Slater, and Bowens assert that there was insufficient evidence to prove their knowing participation in the overarching conspiracy to distribute crack cocaine for which they were convicted. This Court reviews sufficiency of the evidence claims de novo. United States v. Leslie, 103 F.3d 1093, 1100 (2d Cir. 1997). A defendant challenging a district court's denial of a motion for acquittal on the basis of insufficient evidence "bears a heavy burden." United States v. Jones, 482 F.3d 60, 68 (2d Cir. 2006) (internal quotations omitted). We "view the evidence in the light most favorable to the government, drawing all reasonable inferences in its favor, and reverse only if no rational fact finder could have found guilt beyond a reasonable doubt." United States. v. Carlo, 507 F.3d 799, 801 (2d Cir. 2007) (per curiam); United States v. MacPherson, 424 F.3d 183, 187 (2d Cir. 2005) (upholding a conviction if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (quoting Jackson v.

Virginia, 443 U.S. 307, 319 (1979) (emphasis in original))).

To sustain a conspiracy conviction, there must be "some evidence from which it can reasonably be inferred that the person charged with conspiracy knew of the existence of the scheme alleged in the indictment and knowingly joined and participated in it." United States v. Sanchez Solis, 882 F.2d 693, 696 (2d Cir. 1989) (internal quotation marks omitted). "[A] single conspiracy is not transformed into multiple conspiracies merely by virtue of the fact that it may involve two or more phases or spheres of operation, so long as there is sufficient proof of mutual dependence and assistance." United States v. Maldonado-Rivera, 922 F.2d 934, 963 (2d Cir. 1990). Although the Government has the burden of proving the conspiracy alleged in the indictment, "[w]hether it has proved the existence of this conspiracy and each appellant's membership in it or has instead proved multiple other independent conspiracies is a question of act for a properly instructed jury." United States v. Alessi, 638 F.2d 466, 472 (2d Cir. 1980). The issue before us, therefore, is whether the evidence presented supports a finding that the conspiracy was proved and that each appellant was a member of it.

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Avenue) to reopen 205 Alexander Avenue for crack cocaine sales; and (6) fronted Glover crack cocaine and arranged, along with his brothers, to be the source of Glover's resupply.

Witnesses at trial identified Slater as the boss of both 350 and 360 East 137th Street. When the operation was at its peak, Slater's workers sold $4,000-$5,000 worth of crack cocaine per day. A witness testified that when business "slowed up," Slater would "merge" his operations with Trey Boglin (the boss of 175 Alexander Avenue). This included sharing a "stash house." Slater's cooperation with another boss was corroborated by a second witness who testified that he had heard that Slater "joined forces" with Boglin. Also, following the arrest of one of his employees, Slater discussed with bosses Glover and Nelson Martinez his plan to reopen 350 East 137th Street for crack cocaine sales.

The evidence against Bowens included: (1) testimony by Detective Jose Ramirez that he saw Bowens in front of 215 Alexander Avenue "all of the time," and in the company of "a bunch of people"; (2) a surveillance tape showing a drug transaction involving Bowens and a confidential informant; (3) testimony from boss Eric Glover that Bowens worked for him as a pitcher; (4) testimony from Glover that Bowens, for a period of time, distributed packs of crack cocaine to pitchers; (5) testimony that a competitor referred to Glover's people, including Bowens, as "you all" and "guys around here"; (6) testimony from Norbell Lynch that he served as a look-out for Bowens while Bowens was engaged in crack cocaine sales; and (7) testimony by George Verdejo that Glover had told Bowens to

attend to customers who had been waiting, which Bowens then did.

We agree with the district court's assessment that the Government presented enough evidence for the jury to reasonably infer that Jeffrey Martinez, Slater, and Bowens participated in a conspiracy to distribute crack cocaine in and around the Mitchel Houses as charged in the superseding indictment. See United States v. Sisca, 503 F.2d 1337, 1345 (2d Cir. 1974) ("It is sufficient for the government to have proven . . . that each [coconspirator] knew from the scope of the operation that others were involved in the performance of functions vital to the success of the business." (internal quotation marks omitted)).

On appeal, Bowens argues the evidence showed, at most, only that he joined a smaller conspiracy located within 215 Alexander Avenue, not the forty-three person Mitchel Houses conspiracy charged in the indictment. We are not persuaded. "A single conspiracy may be found where there is mutual dependence among the participants, a common aim or purpose or a permissible inference from the nature and scope of the operation, that each actor was aware of his part in a larger organization where others performed similar roles equally important to the success of the venture." United States v. Williams, 205 F.3d 23, 33 (2d Cir. 2000) (internal quotations marks omitted); see also United States v. Barnes, 604 F.2d 121, 155 (2d Cir. 1979) ("retailers whose existence is actually unknown to each other can be held to have agreed in a single conspiracy if each knew or had reason to know that . . . [the] middleman handles a larger quantity of narcotics than one retailer can sell."

(citation omitted)). Based on the evidence presented against him, including, inter alia, Glover's testimony that Eiowens distributed crack cocaine to other pitchers, and Lynch's testimony of serving as a look-out for Bowens, a reasonable jury could infer that Bowens "was aware of his part in a larger organization." See Williams, 205 F.3d at 33.

In his appeal, Slater argues that although he may have participated in the sale of crack cocaine, there was no overarching conspiracy because the crack cocaine dealers in the Mitchel Houses competed against each other for individual customers. This competition, however, does not mean that the conspiracy was not present, as long as the conspirators were working together toward the shared goal of distributing crack cocaine around the Mitchel Houses. Despite evidence of their sometime competing interests, members of the conspiracy shared resources, and workers from the various buildings acted in concert to warn each other if the police were present.

Right to Review Witness Statements

Nathaniel Slater alleges that the district court violated his Fifth and Sixth Amendment rights when it denied his motion to lift a protective order so that he could possess a copy of 18 U.S.C. § 3500/Giglio material in his jail cell without the presence of defense counsel. We find no such violations. The Government timely disclosed the § 3500 material, and Slater was permitted to view it with counsel present. The district court was within its discretion in preventing defendant's unsupervised possession of § 3500 material, which included statements by cooperating

witnesses, to protect such witnesses from intimidation and retribution. This was of particular concern in this case given that two of Slater's codefendants awaiting trial were alleged to have intimidated a prosecution witness in a prior state case.

Sixth Amendment Right to Present Evidence

Jeffrey Martinez argues that this Court should reverse his conviction because the district court violated his Sixth Amendment rights by limiting the extent of his cross-examination of Government witnesses. Specifically, Jeffrey Martinez contends that "[o]n several occasions," the district court improperly prevented him from presenting "evidence of the co-conspirators' backgrounds and the circumstances under which they grew up in the Mitchel[] Housing Projects." "The decision of the trial court to restrict cross-examination will not be reversed on appeal unless its broad discretion has been abused." United States v. Maldonado-Rivera, 922 F.2d 934, 956 (2d Cir. 1990). Here, there has been no abuse of discretion. Jeffrey Martinez does not point to any specific instances in the record in which the court improperly limited Jeffrey Martinez's counsel's attempts to introduce background evidence.

Request for Adjournment and Application of U.S.S.G. § 5G1.3(b)

Alvin Martinez asserts that the district court abused its discretion in refusing to postpone his sentencing so that he could first be sentenced in a New York State criminal case. According to Alvin Martinez, if the state court had sentenced him first, § 5G1.3(b) of

the Sentencing Guidelines would have required the district court to take into account the state sentence and sentence him below the mandatory 120 month minimum. This argument fails. As the district court properly found, § 5G1.3(b) is inapplicable to Alvin Martinez because the state court conviction was not "the basis for an increase in the offense level for the instant offense." See U.S.S.G. § 5G1.3(b). Alvin was found guilty of conspiring to distribute 50 to 150 grams of crack cocaine and received a statutory mandatory minimum sentence of 120 months. Alvin's prior state court conviction for sale of crack cocaine on June 11, 2002, did not increase his base offense level.

Ineffective Assistance of Counsel

Appellant Bowens asserts that his trial counsel was ineffective for failing to explain the Government's plea offer adequately and for refusing to notify the district court of Bowens's desire for new counsel. This Court has a "baseline aversion to resolving ineffectiveness claims on direct review." United States v. Khedr, 343 F.3d 96, 99 (2d Cir. 2003) (citations and internal quotation marks omitted); see also Massaro v. United States, 538 U.S. 500, 504-05 (2003) (expressing preference that an ineffective counsel claim be evaluated pursuant to a § 2255 motion, rather than on direct appeal). But this Court will review ineffective assistance claims on direct appeal when the record is fully developed and resolution is beyond doubt. See United States v. Garcia, 413 F.3d 201, 219 n. 13 (2d Cir. 2005); see also Khedr, 343 F.3d at 100 (holding that this Court should resolve an ineffective assistance claim on direct appeal where "their resolution is beyond any doubt or to do so would be in the interest of

justice." (internal quotations omitted)). Here, the record is not sufficiently developed for us to resolve Bowens's ineffective assistance claim. We believe that Bowens's claim should be heard as part of a § 2255 motion if he opts to file one. We therefore deny his claim of ineffective assistance of counsel without prejudice to his raising it on an appropriate motion for collateral review.

Nelson Martinez's Pro Se Arguments

In his supplemental pro se brief, Nelson Martinez alleges that the Government improperly vouched for the credibility of its witnesses during summation. It did not. In the challenged remarks the Government asked the jury to consider the motives of cooperating witnesses in testifying and what those witnesses would lose if they lied. These remarks were made after defense counsel's attacks on the credibility of cooperating witnesses. The Government's response was not improper. See United States v. Rivera, 22 F.3d 430, 438 (2d Cir. 1994) ("[W]hen the defense has attacked . . . the credibility of the government agents, the prosecutor is entitled to reply with rebutting language suitable to the occasion." (internal quotations omitted)).

Nelson Martinez also contends that he can be held responsible only for the 50 grams of crack cocaine charged in the indictment, and not the 1.5 kilograms of crack cocaine for which he was found responsible by the district court at sentencing. Similarly, he argues that the district court erred by increasing his base offense level in taking account of his leadership role in the conspiracy because the jury did not specifically find

that he was a boss of one of the buildings in the Mitchel Housing Projects. These arguments are without merit. See United States v. Martinez, 525 F.3d 211, 215 (2d Cir. 2008) ("This Court has determined that, judicial authority to find facts relevant to sentencing by a preponderance of the evidence survives Booker . . . and that, with the mandatory use of the Guidelines excised, the traditional authority of a sentencing judge to find all facts relevant to sentencing will encounter no Sixth Amendment objection." (internal quotations and alterations omitted)).

Resentencing in light of Kimbrough

Defendants Nelson Martinez, Jeffrey Martinez, Bowens, and Slater argue on appeal that they are entitled to resentencing in light of Kimbrough, 128 S. Ct. 558, and the retroactive amendments to the Guidelines pertaining to crack cocaine. The Government has consented to a remand, and we agree that one is appropriate here. See United States v. Regalado, 518 F.3d 143 (2d Cir. 2008).

We have considered appellants' remaining arguments regarding their convictions and find them to be without merit.

For the foregoing reasons, appellants' appeals are DENIED, and their judgments of conviction are affirmed in all respects, except that the case is remanded for resentencing of Nelson Martinez, Jeffrey Martinez, Bowens, and Slater and we note, as to Bowens's ineffective assistance argument that it has been denied without prejudice. We do not address

defendants' arguments about the reasonableness of their sentences as such arguments may become moot following resentencing, and may be raised in a subsequent appeal following entry of final judgments.[2]

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

By: s/

[2] This includes Nelson Martinez's argument that his sentence was unreasonable because the district court did not fairly and accurately consider the factors under 18 U.S.C. § 3553(a)).

LEXSEE 2009 US APP. LEXIS 8075

United States of America, Appellee, v. Gregory Moore, Jason Mitchell, Jeffrey Martinez, Alvin Martinez, Nathaniel Slater, Anthony Bowens also known as Tony Felder, Nelson Martinez, Defendants-Appellants. [1]

1 We resolved the appeals of Defendants Gregory Moore and Jason Mitchell in separately issued orders.

Docket No.[s]: 07-1589-cr(lead), 07-2247-cr(Con), 07-2787-cr(Con), 07-2930-cr(Con), 07-2931-cr(Con), 07-3584-cr(Con)

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

2009 U.S. App. LEXIS 8075

April 17, 2009, Decided

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

PRIOR HISTORY: *United States v. Martinez, 2007 U.S. Dist. LEXIS 45548 (S.D.N.Y., June 18, 2007)*

COUNSEL: [*1] FOR APPELLANT JEFFREY MARTINEZ: Anthony L. Ricco, (Steven Z. Legon, on the brief), New York, NY.

FOR APPELLANT ALVIN MARTINEZ: Maurice H. Sercarz, (Julia L. Gatto, on the brief), SERCARZ & RIOPELLE, LLP, New York, NY.

FOR APPELLANT NATHANIEL SLATER: William H. Devaney, (Liam C. Ewing, Jr., Meredith Boylan, on the brief), VENABLE LLP, New York, NY.

FOR APPELLANT ANTHONY BOWENS: Melinda M. Sarafa, SARAFA LAW, LLC, New York, NY.

FOR APPELLANT NELSON MARTINEZ: Steven A. Feldman, New York, NY.

FOR APPELLEE: David V. Harbach, II, Assistant United States Attorney for Michael J. Garcia, United States Attorney for the Southern District of New York, New York, NY.

JUDGES: PRESENT: HON. CHESTER J. STRAUB, HON. PETER W. HALL, Circuit Judges, HON. STEFAN R. UNDERHILL, * District Judge.

* The Honorable Stefan R. Underhill, United States District Judge for the District of Connecticut, sitting by designation.

OPINION

SUMMARY ORDER

UPON DUE CONSIDERATION, it is hereby ORDERED, ADJUDGED, AND DECREED that the judgments of conviction of the United States District Court for the Southern District of New York (Rakoff, *J.*) are AFFIRMED and the sentences of Appellants Jeffrey Martinez, Nelson Martinez, Nathaniel Slater, and Anthony [*2] Bowens are remanded for resentencing in accordance with *Kimbrough v. United States, 128 S. Ct. 558, 169 L. Ed. 2d 481 (2007).*

Defendants-appellants Jeffrey Martinez, Nelson Martinez, Slater, Bowens, and Alvin Martinez appeal from judgments of conviction entered on June 26, 2007, June 28, 2007, June 29, 2007, and July 27, 2007, resulting from their involvement in a conspiracy to distribute crack cocaine in and around the Mitchel Housing Projects in the County of the Bronx between 1994 and 2005. Following a jury trial in the Southern District of New York, Defendants Jeffrey Martinez, Nelson Martinez, Slater, and Bowens were convicted of conspiracy to distribute 50 grams or more of crack cocaine, in violation of *21 U.S.C. §§ 841* and *846*. Defendant Alvin Martinez pleaded guilty prior to trial pursuant to a plea agreement. The district court sentenced Jeffrey Martinez, Nelson Martinez, and Slater to 360 months' imprisonment. Bowens received a sentence of 180 months, and Alvin Martinez was sentenced to 120 months' imprisonment.

On appeal, the defendants challenge their convictions and sentences on numerous grounds. We

assume the parties' familiarity with the underlying facts and procedural history.

Sufficiency [*3] of Evidence

Jeffrey Martinez, Slater, and Bowens assert that there was insufficient evidence to prove their knowing participation in the overarching conspiracy to distribute crack cocaine for which they were convicted. This Court reviews sufficiency of the evidence claims *de novo. United States v. Leslie, 103 F.3d 1093, 1100 (2d Cir. 1997).* A defendant challenging a district court's denial of a motion for acquittal on the basis of insufficient evidence "bears a heavy burden." *United States v. Jones, 482 F.3d 60, 68 (2d Cir. 2006)* (internal quotations omitted). We "view the evidence in the light most favorable to the government, drawing all reasonable inferences in its favor, and reverse only if no rational factfinder could have found guilt beyond a reasonable doubt." *United States. v. Carlo, 507 F.3d 799, 801 (2d Cir. 2007)* (per curiam); *United States v. MacPherson, 424 F.3d 183, 187 (2d Cir. 2005)* (upholding a conviction if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (quoting *Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)* (emphasis in original))).

To sustain a conspiracy conviction, there must be "some evidence from which [*4] it can reasonably be inferred that the person charged with conspiracy knew of the existence of the scheme alleged in the indictment and knowingly joined and participated in it." *United States v. Sanchez Solis, 882 F.2d 693, 696 (2d Cir. 1989)* (internal quotation marks omitted).

"[A] single conspiracy is not transformed into multiple conspiracies merely by virtue of the fact that it may involve two or more phases or spheres of operation, so long as there is sufficient proof of mutual dependence and assistance." *United States v. Maldonado-Rivera, 922 F.2d 934, 963 (2d Cir. 1990).* Although the Government has the burden of proving the conspiracy alleged in the indictment, "[w]hether it has proved the existence of this conspiracy and each appellant's membership in it or has instead proved multiple other independent conspiracies is a question of act for a properly instructed jury." *United States v. Alessi, 638 F.2d 466, 472 (2d Cir. 1980).* The issue before us, therefore, is whether the evidence presented supports a finding that the conspiracy was proved and that each appellant was a member of it.

As to Jeffrey Martinez, witnesses at trial testified that he: (1) was a boss of 205 Alexander [*5] Avenue; (2) shared a supplier with Slater (the boss of 350 East 137th Street); (3) jointly purchased large quantities of crack cocaine with Nelson Martinez and Anthony Glover (the boss of 215 Alexander Avenue); (4) acted to keep out competition; (5) "join[ed] forces" with Slater and Trey Boglin (the boss of 175 Alexander Avenue) to reopen 205 Alexander Avenue for crack cocaine sales; and (6) fronted Glover crack cocaine and arranged, along with his brothers, to be the source of Glover's resupply.

Witnesses at trial identified Slater as the boss of both 350 and 360 East 137th Street. When the operation was at its peak, Slater's workers sold $ 4,000-$ 5,000 worth of crack cocaine per day. A

witness testified that when business "slowed up," Slater would "merge" his operations with Trey Boglin (the boss of 175 Alexander Avenue). This included sharing a "stash house." Slater's cooperation with another boss was corroborated by a second witness who testified that he had heard that Slater "joined forces" with Boglin. Also, following the arrest of one of his employees, Slater discussed with bosses Glover and Nelson Martinez his plan to reopen 350 East 137th Street for crack cocaine sales.

The [*6] evidence against Bowens included: (1) testimony by Detective Jose Ramirez that he saw Bowens in front of 215 Alexander Avenue "all of the time," and in the company of "a bunch of people"; (2) a surveillance tape showing a drug transaction involving Bowens and a confidential informant; (3) testimony from boss Eric Glover that Bowens worked for him as a pitcher; (4) testimony from Glover that Bowens, for a period of time, distributed packs of crack cocaine to pitchers; (5) testimony that a competitor referred to Glover's people, including Bowens, as "you all" and "guys around here"; (6) testimony from Norbell Lynch that he served as a look-out for Bowens while Bowens was engaged in crack cocaine sales; and (7) testimony by George Verdejo that Glover had told Bowens to attend to customers who had been waiting, which Bowens then did.

We agree with the district court's assessment that the Government presented enough evidence for the jury to reasonably infer that Jeffrey Martinez, Slater, and Bowens participated in a conspiracy to distribute crack cocaine in and around the Mitchel Houses as charged in the superseding indictment.

See United States v. Sisca, 503 F.2d 1337, 1345 (2d Cir. 1974) [*7] ("It is sufficient for the government to have proven . . . that each [coconspirator] knew from the scope of the operation that others were involved in the performance of functions vital to the success of the business." (internal quotation marks omitted)).

On appeal, Bowens argues the evidence showed, at most, only that he joined a smaller conspiracy located within 215 Alexander Avenue, not the forty-three person Mitchel Houses conspiracy charged in the indictment. We are not persuaded. "A single conspiracy may be found where there is mutual dependence among the participants, a common aim or purpose or a permissible inference from the nature and scope of the operation, that each actor was aware of his part in a larger organization where others performed similar roles equally important to the success of the venture." *United States v. Williams, 205 F.3d 23, 33 (2d Cir. 2000)* (internal quotations marks omitted); *see also United States v. Barnes, 604 F.2d 121, 155 (2d Cir. 1979)* ("retailers whose existence is actually unknown to each other can be held to have agreed in a single conspiracy if each knew or had reason to know that . . . [the] middleman handles a larger quantity of narcotics [*8] than one retailer can sell." (citation omitted)). Based on the evidence presented against him, including, *inter alia,* Glover's testimony that Bowens distributed crack cocaine to other pitchers, and Lynch's testimony of serving as a look-out for Bowens, a reasonable jury could infer that Bowens "was aware of his part in a larger organization." *See Williams, 205 F.3d at 33.*

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Nathaniel Slater alleges that the district court violated his *Fifth* and *Sixth Amendment* rights when it denied his motion to lift a protective [*9] order so that he could possess a copy of *18 U.S.C. § 3500/Giglio* material in his jail cell without the presence of defense counsel. We find no such violations. The Government timely disclosed the *§ 3500* material, and Slater was permitted to view it with counsel present. The district court was within its discretion in preventing defendant's unsupervised possession of *§ 3500* material, which included statements by cooperating witnesses, to protect such witnesses from intimidation and retribution. This was of particular concern in this case given that two of Slater's codefendants awaiting trial were alleged to have intimidated a prosecution witness in a prior state case.

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Request for Adjournment and Application of *U.S.S.G. § 5G1.3(b)*

Alvin Martinez asserts that the district court abused its discretion in refusing to postpone his sentencing so that he could first be sentenced in a New York State criminal case. According to Alvin Martinez, if the state court had sentenced him first, *§ 5G1.3(b) of the Sentencing Guidelines* would have required the district court to take into account the state sentence and sentence him below the mandatory 120 month minimum. This argument fails. As the district court properly found, *§ 5G1.3(b)* is inapplicable to Alvin Martinez because the state

court conviction was not "the basis for an increase in the offense level for the instant offense." *See U.S.S.G. § 5G1.3(b).* Alvin was found guilty of conspiring to distribute [*11] 50 to 150 grams of crack cocaine and received a statutory mandatory minimum sentence of 120 months. Alvin's prior state court conviction for sale of crack cocaine on June 11, 2002, did not increase his base offense level.

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Appellant Bowens asserts that his trial counsel was ineffective for failing to explain the Government's plea offer adequately and for refusing to notify the district court of Bowens's desire for new counsel. This Court has a "baseline aversion to resolving ineffectiveness claims on direct review." *United States v. Khedr, 343 F.3d 96, 99 (2d Cir. 2003)* (citations and internal quotation marks omitted); *see also Massaro v. United States, 538 U.S. 500, 504-05, 123 S. Ct. 1690, 155 L. Ed. 2d 714 (2003)* (expressing preference that an ineffective counsel claim be evaluated pursuant to a § 2255 motion, rather than on direct appeal). But this Court will review ineffective assistance claims on direct appeal when the record is fully developed and resolution is beyond doubt. *See United States v. Garcia, 413 F.3d 201, 219 n. 13 (2d Cir. 2005)*; *see also Khedr, 343 F.3d at 100* (holding that this Court should resolve an ineffective assistance claim on direct appeal where "their resolution [*12] is beyond any doubt or to do so would be in the interest of justice." (internal quotations omitted)). Here, the record is not sufficiently developed for us to resolve Bowens's ineffective assistance claim. We believe

that Bowens's claim should be heard as part of a § 2255 motion if he opts to file one. We therefore deny his claim of ineffective assistance of counsel without prejudice to his raising it on an appropriate motion for collateral review.

Nelson Martinez's *Pro Se* Arguments

In his supplemental *pro se* brief, Nelson Martinez alleges that the Government improperly vouched for the credibility of its witnesses during summation. It did not. In the challenged remarks the Government asked the jury to consider the motives of cooperating witnesses in testifying and what those witnesses would lose if they lied. These remarks were made after defense counsel's attacks on the credibility of cooperating witnesses. The Government's response was not improper. *See United States v. Rivera, 22 F.3d 430, 438 (2d Cir. 1994)* ("[W]hen the defense has attacked . . . the credibility of the government agents, the prosecutor is entitled to reply with rebutting language suitable to the occasion." (internal [*13] quotations omitted)).

Nelson Martinez also contends that he can be held responsible only for the 50 grams of crack cocaine charged in the indictment, and not the 1.5 kilograms of crack cocaine for which he was found responsible by the district court at sentencing. Similarly, he argues that the district court erred by increasing his base offense level in taking account of his leadership role in the conspiracy because the jury did not specifically find that he was a boss of one of the buildings in the Mitchel Housing Projects. These arguments are without merit. *See United States v. Martinez, 525 F.3d 211, 215 (2d Cir. 2008)* ("This

Court has determined that, judicial authority to find facts relevant to sentencing by a preponderance of the evidence survives *Booker* . . . and that, with the mandatory use of the Guidelines excised, the traditional authority of a sentencing judge to find all facts relevant to sentencing will encounter no *Sixth Amendment* objection." (internal quotations and alterations omitted)).

Resentencing in light of *Kimbrough*

Defendants Nelson Martinez, Jeffrey Martinez, Bowens, and Slater argue on appeal that they are entitled to resentencing in light of *Kimbrough, 128 S. Ct. 558, 169 L. Ed. 2d 481,* [*14] and the retroactive amendments to the Guidelines pertaining to crack cocaine. The Government has consented to a remand, and we agree that one is appropriate here. *See United States v. Regalado, 518 F.3d 143 (2d Cir. 2008).*

We have considered appellants' remaining arguments regarding their convictions and find them to be without merit.

For the foregoing reasons, appellants' appeals are DENIED, and their judgments of conviction are affirmed in all respects, except that the case is remanded for resentencing of Nelson Martinez, Jeffrey Martinez, Bowens, and Slater and we note, as to Bowens's ineffective assistance argument that it has been denied without prejudice. We do not address defendants' arguments about the reasonableness of their sentences as such arguments may become moot following resentencing, and may

be raised in a subsequent appeal following entry of final judgments.[2]

[2] This includes Nelson Martinez's argument that his sentence was unreasonable because the district court did not fairly and accurately consider the factors under *18 U.S.C. § 3553(a)*).

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 19th day of May, two thousand nine.

UNITED STATES COURT OF APPEALS
FILED
MAY 19 2009
Catherine O'Hagan Wolfe, Clerk
SECOND CIRCUIT

PRESENT: HON. CHESTER J. STRAUB,
HON. PETER W. HALL,
Circuit Judges,
HON. STEFAN R. UNDERHILL,*
District Judge.

United States of America,

Appellee,

v. No, 07-1589-cr

Gregory Moore, Jason Mitchell, Jeffrey Martinez, Alvin martinez, Nathaniel Slater, Anthony Bowen also known as Tony Felder, Nelson Martinez,

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* The Honorable Stefan R. Underhill, United States District Judge for the District of Connecticut, sitting by designation.

Defendants-Appellants.

Anthony Bowens having filed a petition for panel rehearing and the panel that determined the appeal having considered the request,

IT IS HEREBY ORDERED that the petition is denied,

FOR THE COURT:
Catherine O'Hagan, Wolfe,
Clerk

By: s/
Frank Perez, Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	: S3 04 Cr. 048 (JSR)
-v-	:
NELSON MARTINEZ et al.,	:
Defendants.	:

JED S. RAKOFF, U.S.D.J.

On March 14, 2007, a jury convicted defendants Nelson Martinez, Jeffrey Martinez, Nathaniel Slater, and Tony Felder of conspiring to distribute "crack" cocaine, as charged in Count One of the Superseding Indictment ("S30"), and also convicted Felder of substantive distribution of crack cocaine as charged in Count Three of the same indictment. Thereafter, Slater, Felder, and Jeffrey Martinez timely moved, pursuant to Fed. R. Crim. P. 29, for a judgment of acquittal on the conspiracy count, arguing that the evidence at trial established, at most, that they participated in multiple, independent conspiracies involving separate buildings in the so-called "Mitchel Houses" rather than the single conspiracy charged in Count One involving the area as a whole.

Whether the Government has "proved a single conspiracy or has instead proved 'multiple other independent conspiracies is a question of fact for a properly instructed jury." United States v. Aracri, 968 F.2d 1512, 1519 (2d Cir. 1992) (quoting United

States v. Alessi, 638 F.2d 466, 472 (2d Cir. 1980)). Here, defendants concede that the Court properly instructed the jury, without objection, as follows:

> The defendants . . . argue that the government's proof only shows, at most, a group of separate independent conspiracies each limited to a particular building or location. If, as to any given defendant, you find that he joined not the more general conspiracy charge[d], but only one or more lesser conspiracies, that he understood were limited to particular buildings or locations, then you must acquit that defendant of the conspiracy here charged.

See trial transcript ("tr.") 3/12/07, at 1960-61. see also Court Exhibit 1 (Court's written charge given to the jury). Accordingly, the jury necessarily heard, considered, and rejected the precise argument defendants are here raising, and the jury's verdict may only be disturbed if, viewing all the evidence in the light most favorable to the Government and construing all possible inferences in its favor, a "rational trier of fact could [not] have found the essential elements of the crime beyond a reasonable doubt." See Jackson v. Virginia, 443 U.S. 307, 319 (1979).

It is axiomatic that the Government, in seeking to prove a single conspiracy, need not present evidence of a "formal or express agreement, but may rely on proof that the parties have a tacit understanding to engage in the offense." United States v. Amato, 15 F.3d 230, 235 (2d Cir. 1994).

"Moreover, 'a single conspiracy is not transformed into multiple conspiracies merely by virtue of the fact that it may involve two or more phases or spheres of operation, so long as there is sufficient proof of mutual dependence and assistance.' United States v. Berger, 224 F.3d 107, 114-15 (2d Cir. 2000) (quoting United States v. Maldonado-Rivera, 922 F.2d 934, 963 (2d Cir. 1990)).

In this case, the circumstantial evidence presented at trial overwhelmingly established that the so-called "bosses" of the crack distribution networks at the various buildings gave one another substantial assistance in furtherance of a single conspiracy, that they joined forces in protecting their joint turf from other, outside groups, and that each moving defendant agreed to participate in what he knew to be "a collective venture toward a common goal," i.e., distributing crack cocaine in and around the Mitchel Houses area. See United States v. Geibel, 369 F.3d 682, 689 (2d Cir. 2004). For example, the jury was presented with testimony from several cooperating witnesses to the effect that the bosses of the different buildings mutually shared weapons, see, e.g., tr., 3/1/07, at 732-33, mutually shared suppliers, see, e.g., tr., 3/6/07, at 1152-56, mutually shared a stash house, see, e.g., tr., 3/8/07, 1541-43, and mutually shared information about police surveillance, see, e.g., tr., 3/1/07, 718-19. The jury thus had ample circumstantial evidence to support the inference that the defendants' involvement in selling crack cocaine at particular buildings was part of a common enterprise involving all the buildings.

Although defendant Slater emphasizes there was also some competition among the various buildings, such internecine competition in no way precludes the jury's finding, based on the kind of testimony mentioned above, that this was merely incidental to a single conspiracy that took as its larger goal control over crack sales in the Mitchel Houses as a whole . See United States v. Friedman, 854 F.2d 535, 563 (2d Cir. 1988). As for Slater's additional contention that, even if there was such an overall conspiracy, the Government did not provide sufficient evidence linking him to that conspiracy, this contention was more than refuted by the testimony of cooperating witnesses Norbell Lynch and Eric Glover linking Slater to the overall conspiracy. For example, Lynch testified that "When [business] slowed up . . . Mr. Slater and Mr. Boglin [the boss at a different building] would . . . merge. They would come together and like network . . . ." See tr., 3/1/07, at 718-19. Likewise, Glover testified that Jeffrey Martinez told him Slater had "joined forces" with Boglin. See tr., 2/28/07, at 375-76. The jury was fully entitled to credit such testimony.

Accordingly, for the foregoing reasons, defendants' post trial motions are hereby denied in all respects. The Clerk of the Court is directed to close documents 447, 449, 450 and 453.

SO ORDERED.

s/

JED S. RAKOFF, U.S.D.J.

Dated: New York, New York
June 18, 2007

UNITED STATES DISTRICT COURT

SOUTHERN District of NEW YORK

UNITED STATES OF AMERICA

V.

NATHANIEL SLATER

JUDGMENT IN A CRIMINAL CASE

Case Number: 1:S30 04CR0048-36 (JSR)

USM Number: 59242-054

William Devaney
Defendant's Attorney

THE DEFENDANT:
pleaded guilty to count(s)_____

pleaded nolo contendere to count(s)
which was accepted by the court. _____

X was found guilty on count(s) 1
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section
21 U.S.C. 846

Nature of Offense
Conspiracy to distribute narcotics

Offense Ended
January 2005

Count
1

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) _____

X Count(s) ALL OPEN COUNTS is X are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

June 28, 2007
Date of Imposition of Judgment

s/
Signature of Judge

Hon. Jed S. Rakoff, U.S.D.J.
Name and Title of Judge

6/28/07
Date

USDC SDNY
DOCUMENT ELECFRONICALLY FILED
DOC #: _____
DATE FILED: 6- 29 -07

DEFENDANT: NATHANIEL SLATER
CASE NUMBER: 1 : S30 04CR0048-36 (JSR)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: **Three sixty months (360) months**

X The court makes the following recommendations to the Bureau of Prisons:
1. The Court recommends that the defendant be incarcerated at a facility as close to the New York City area as possible.
2. The Court recommends that the defendant be considered for a drug and alcohol treatment program while incarcerated.

X The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:

at _____ a.m. p.m. on _____

as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 2 p.m. on _____.

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on_____to____
a_____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: NATHANIEL SLATER
CASE NUMBER: 1 :S30 04CR0048-3 6 (JSR)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of : **Five (5) years**

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

X The above drug testing condition is suspended and instead replaced by special condition number one on page four

X The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

X The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is student, as directed by the probation officer. (Check, if applicable.)

The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and

to confirm the defendant s compliance with such notification requirement.

DEFENDANT: NATHANIEL SLATER
CASE NUMBER: 1:S30 04CR0048-36 (JSR)

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall participate in a program approved by the United States Probation Office for substance abuse, which program may include testing to determine whether the defendant has reverted to the use of drugs or alcohol. The Court authorizes the release of available drug treatment evaluations and reports to the substance abuse treatment provider, as approved by the Probation Officer. The defendant will be required to contribute to the costs of services rendered (copayment) in an amount to be determined by the probation officer, based on ability to pay or availability of third party payment.

2. The defendant shall participate in an alcohol aftercare treatment program under a co-payment plan, which may include testing at the direction and discretion of the probation officer.

3. The defendant is to be supervised in the district of his residency.

DEFENDANT: NATHANIEL SLATER
CASE NUMBER: 1:S30 04CR0048-36 (JSR)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

TOTALS

Assessment	Fine	Restitution
$100.00	$	$

The determination of restitution is deferred until _____. An *Amended Judgment* in a Criminal Case (AO 245C) will be after such determination.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*
Restitution Ordered	**Priority or Percentage**

---

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

TOTALS $0.00 $0.00

Restitution amount ordered pursuant to plea agreement $

The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612. All of the payment options on Sheet 6 may be subject. to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest and it is ordered that:

the interest requirement is waived for the fine restitution.

the interest requirement for the fine restitution is modified as follows:

DEFENDANT: NATHANIEL SLATER
CASE NUMBER: 1:S30 04CR0048-36 (JSR)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A **X** Lump sum payment of $ 100.00 due

immediately, balance due

not later than _____, or
in accordance C, D, E, or F below; or

B Payment to begin immediately (may be combined with C, D, or F below); or

C Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $____over a period of ___ (e.g., months or years), to commence (e.g., 30 or 60 days) after the date of this judgment; or

D Payment in equal ____ (e.g., weekly, monthly, quarterly) installments of $____over a period of ___ (e.g., months or years), to commence (e.g., 30 or 60 days) after release from imprisonment to a term of Supervision; or

E Payment during the term of supervised release will commence within ____(e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal

Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

The defendant shall pay the cost of prosecution.

The defendant shall pay the following court cost(s):

The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.